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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1092

JOHN DUFF ABERCROMBIE

Petitioner,

V.

STATE OF LOUISIANA

Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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II.
STATEMENT OF THE CASE

The facts in this matter as determined by the Louisiana Supreme Court are as follows.

On the night of October 21, 1976, Father Ted Lelieveld, a Catholic priest, was shot twice in the chest when he answered a knock at his front door. He died shortly thereafter.

There were no eyewitnesses to the shooting. The following day a .38 caliber pistol was found near the scene of the crime, but the police still had no suspects. They concentrated on investigating

several anti-Catholic incidents that had occurred in the surrounding area during the four preceding months.

A composite sketch was obtained from several witnesses to these prior acts of vandalism, assault, and battery. This composite reminded two policemen of a man they had stopped some weeks earlier. As a result the police visited the home of the defendant, where they saw three vehicles that matched descriptions given by the witnesses of the several prior incidents.

The police were admitted by the defendant's father. When they saw that the defendant matched the composite sketch, he was arrested for the prior acts of battery, assault, and criminal damage to property.

During the arrest the officers seized a box of .38 caliber shells and a cigarette pack with four .38 caliber shells. After obtaining a search warrant and searching further, some letters and tapes evidencing a strong antagonism towards the Catholic church were also seized.

Several days later the defendant was indicted for the first degree murder of Father Lelieveld.

The defendant was initially determined by a sanity commission to be incapable of standing trial. Eventually, however, he was found to be competent to stand trial, and he pleaded not guilty and not guilty by reason of insanity.

His motion for a change of venue and his motion to suppress the evidence seized at the time of his arrest were both denied. The trial court overruled the defendant's objection to a state pre-trial

Prieur motion to permit the admission of evidence concerning the prior acts of vandalism and potential violence.

At his trial the gun, the bullets, the letters and tapes, and the other crimes evidence were all introduced. Other than cross-examination, the only evidence introduced by the defense was psychiatric testimony to the effect that if he had committed the crime he could not tell right from wrong. On rebuttal, the local coroner testified that he thought the defendant had known right from wrong.

The jury returned a verdict of guilty. After a sentencing hearing, the defendant was sentenced to life imprisonment.

On appeal to the Louisiana Supreme Court, the defendant's conviction was affirmed on September 4, 1979. On October 8, 1979, defendant's application for rehearing was denied.

III.

Defendant petitioner raises four questions for this Honorable Court's consideration. The first question addresses the claim of the Defendant that his rights to due process under the Fourteenth Amendment were violated because the evidence presented against him was insufficient to constitute proof of guilt beyond a reasonable doubt as could be found by any rational trier of fact.

This issue was argued before the Louisiana Supreme Court. In disposing of Defendant's contentions, the Louisiana Supreme Court stated:

"We have discussed the evidence in this detail because the United States Supreme Court, in *Jackson v. Virginia*,_____U.S._____, 98 S.Ct. 2781 (1979), seems to hold a review of the sufficiency of the evidence to support a conviction than the 'some evidence' rule.

* * * *

The test mandated is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found . . . beyond a reasonable doubt' that the defendant is guilty. 99 S.Ct. 2789.

Applying this test, we have little difficulty in finding that the evidence overwhelmingly supports a determination that, due to the accused's severe paranoid schizophrenia, he was irresistibly compelled to accept the perceived direction of the higher beings whom he felt controlled him, by reason of which he did not know that it was *morally* wrong to kill the victim.

On the other hand, the expert evidence also admitted that the accused knew it was '*humanly* wrong', being illegal, to kill another human being."

In Louisiana, the question of legal insanity is for the Jury. In *State v. Rollins*, 351 So.2d 470, 472 (1977), the Louisiana Supreme Court stated:

> "With regard to the issue of insanity at the time of the offense: A defendant is persumed to be sane at that time. *State v. Marmillion*, 339 So.2d 788 (La. 1976). The defendant has the burden of establishing the defense of insanity at the time of the crime. La. C.Cr.P. art. 652; *State v. Craig*, 340 So.2d 191 (La. 1976). The determination of whether the defendant was insane at the time of the crime is a fact question reserved for the jury. *State v. Daigle*, 344 So.2d 1380 (La. 1977); *State v. Clark*, 305 So.2d 457 (La. 1974).

In a recent decision (March 3, 1980), the Louisiana Supreme Court, on rehearing, reversed itself and affirmed the conviction of a defendant involved in a shooting spree. *State v. Poree*, ____So.2d_____(1980), No. 68-308, 318. Poree had been charged with nine (9) counts of attempted murder and one (1) count of armed robbery after going on a shooting spree in New Orleans, Louisiana. At trial he pled not guilty and not guilty by reason of insanity. He was convicted and appealed his conviction to the Louisiana Supreme Court. On appeal the Louisiana Supreme Court reversed the conviction concluding that:

> ". . . the presumption of sanity which serves to shift the burden of proving insanity to defendant is a rebuttal presumption: upon the defendant's production of evidence of insanity, the presumption is destroyed, and if the defendant's evidence outweighs that of the State, the fact-finder must find him not guilty by reason of insanity."

On rehearing however, the Louisiana Supreme Court, Watson, J., for the majority stated:

> "We now find that the majority on original hearing erred in this conclusion."

* * *

"Applying these rules to the instant appeal, it is apparent that the question before us is whether there was any evidence before the jury on which it could reach the conclusion that the defendant had failed to prove his defense of insanity.

The Statutory law is clear:

'The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence.' "

* * *

"There is no question that the evidence of Poree's sanity, as reflected by the testimony of the psychiatrists and the lay witnesses, is weak. However, it is impossible to conclude that there is no evidence of sanity. It is also important to remember that every person is presumed to be sane. *State v. Chinn*, 229 La. 984, 87 So.2d 315 (1956).

* * *

The jury concluded that Poree had not borne his burden of establishing the defense of insanity."

The second question Petitioner Defendant presents to this Honorable Court for consideration is Defendant's claim that the admission of other crimes' evidence violated defendant's rights to a fair trial and due process under the Sixth and Fourteenth Amendments.

This issue was argued before the Louisiana Supreme Court. In disposing of defendant's contentions, the Louisiana Supreme Court stated:

"At a pre-trial hearing to determine the admissibility of these other crimes, the state argued that they were admissible to show intent, knowledge and motive. The trial judge ruled that the evidence was admissible.

* * *

In *State v. Prieur*, cited above, and its progeny, we have extensively delineated the scope of the three relevant statutory purposes for which other crimes evidence may be introduced. These three purposes are those set forth by the legislature in La. R.S. 15:445, 446 — to prove knowledge, intent, and system. (However, we have also had occasion to note other bases of independent relevancy, such as motive. *State v. Sutfield*, 354 So.2d 1334, 1336-37 (La. 1978).

* * *

In *State v. Sutfield*, 354 So.2d 1334, 1336-37, (La. 1978), we recognized that evidence of other crimes may be admissible if the evidence is relevant to show motive, i.e., to show that the defendant had a reason to commit the crime he is charged with. Motive is generally recognized as an independent basis of relevancy. See McCormick, Evidence, Section 190 at 450-54 (2d ed. 1972); 2 Weinstein and Berger, Weinstein's Evidence, Section 404 (09) at 404-53 (1979); Comment, Other Crimes Evidence in Louisiana, 33 La. L. Rev. 614, 617 (1973).

* * *

In addition, as with all evidence of other crimes that is independently relevant, other crimes evidence admitted to show motive must satisfy two tests: 1) there must be clear and convinc-

ing evidence that the defendant did indeed commit the other crimes, and 2) the probative value of the evidence must outweigh the risk of prejudice — the risk that the evidence will be used to convict the defendant because he is a man with a criminal disposition. *State v. Sutfield*, cited above, 354 So.2d 1334.

* * *

The existence of these two additional tests is necessitated by the rationale behind the general prohibition against evidence of other crimes, the fear that a defendant may be convicted because of a criminal disposition rather than actual guilt. In order to minimize the risk of prejudice, it must be clear (a) that the defendant committed the other crimes and (b) that their probative value exceeds the risk of prejudice to the defendant.

* * *

Applying the above principles, we hold that the testimony of Father Elson (1), Mrs. Wagner (2), and Mrs. Johnson (3), was properly admissible to prove motive. The defendant was charged with an apparently senseless killing, so any evidence tending to prove that the defendant had a motive or reason for committing this crime was extremely probative.

* * *

Since the evidence tended to prove a factually particular motive of great probative value in this case, the issue becomes whether the defendant's connexity with these other crimes was adequately established and whether the evidence's risk of prejudice outweighed its probative value.

However, the other three witnesses, Father Elson (1), Mrs. Wagner (2), and Mrs. Johnson (3), were able to identify unequivocably the defendant as the man they had seen. Therefore, their testimony was admissible, unless its probativeness was outweighed by the risk of prejudice.

In balancing probativeness versus prejudice it is important to remember the reason for the rule; it is designed to prevent the jury from improperly convicting the defendant simply because he is a bad man or has committed other crimes. In the instant case, a first-degree murder trial, there was very little risk that the jury's objectivity would be swayed by evidence that the defendant has punched someone and thrown a brick at him and that he had hit someone's hand and slapped a window."

State v. Prieur and *State v. Sutfield* are still valid law in Louisiana.

The third question Petitioner Defendant presents to this Honorable Court for consideration is the claim that Defendant's rights were violated because of the distinction between legal wrong and moral wrong drawn by the Louisiana Supreme Court. While this particular question was not specifically raised on appeal to the Louisiana Supreme Court, that Court disposed of this question by stating:

> "... that, due to the accused's severe paranoid schizophrenia, he was irresistibly compelled to accept the perceived direction of the higher beings whom he felt controlled him, by reason of which he did not know that it was *morally* wrong to kill the victim.

On the other hand, the expert evidence also admitted that the accused knew it was '*humanly* wrong', being illegal, to kill another human being.

The difficulty is that the M'Naughten test of *legal* insanity, i.e., being capable of distinguishing between right and wrong with regard to the conduct in question, is not in origin or application a medical or scientific concept ...

However, in the last analysis, it is rather a question of law than of medicine as to what the cognizable 'wrong' is; a legal rather than a medical question is presented by the issue of whether an accused is legally insane who knows it is *legally* wrong to kill another human being, but who does not know it is *morally* wrong (being under a delusion or compulsion produced by severe mental disease). Indeed, the predominant practice in American jurisdictions seems without discussion to leave it to the factual determination of the trial jury to determine whether the defendant was capable of knowing right from 'wrong' with regard to the conduct complained of, without specifying as a matter of law whether the defendant must know it to be 'morally' or instead 'legally' wrong. LaFave and Scott, *Criminal Law* 278-279 (1972). The jury is thus free to exculpate for legal insanity on either basis, providing that the inability to know is a product of a mental disease or defect.

As we apprehend our Louisiana jurisprudence, we have followed the latter practice in the application of the 'right - wrong' test of La. R.S. 14:14. Therefore, we have not disturbed jury findings of sanity when the instructions to the jury have permitted it to find the accused sane if the accused knows it is 'wrong' to

commit the offense, without specifying that he must know it is *either* 'legally' or 'morally' wrong. That is, we have not as a matter of law required that there by exculpation by reason of legal insanity where the accused does not know his act is *morally* wrong because of 'irresistible impulse' or some variation of this concept. *State v. Johanson*, 332 So.2d 270 (La. 1976); *State v. Berry*, 324 So.2d 822 (La. 1976); *State v. Plaisance*, 210 So.2d 323 (La. 1968); *State v. Bickham*, 121 So.2d 207 (La. 1960); *State v. Jenkins*, 107 So.2d 632 (1958). As these decisions illustrate, we have until now noted the strong arguments against the restricted standard of legal insanity thus represented, but have preferred to leave to legislative revision any clarification or improvement of the statutory test and its jurisprudential interpretations by this court.

We therefore do not find merit to this assignment."

The fourth question Defendant Petitioner presents for this Honorable Court's consideration is defendant's claim that his Fifth and Fourteenth Amendment rights were violated by the introduction of an inculpatory statement made to the Parish Coroner without the State giving notice to the Defendant of the State's intention to do so.

This issue was not raised at the State level by the Defendant therefore is not part of the record, and as such under the rules of this Honorable Court, will not be considered by this Court.

IV.
CONCLUSION

The Petition for Writ of Certiorari should be denied in this case because petitioner has failed to show that any Constitutional or legal right to which he is entitled has been abridged by any State statute or action. 28 USCA § 1257 (3).

Respectfully submitted:

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V.
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petition for Writ of Certiorari has been served on the Petitioner by placing copies of same in the United States Mail, postage prepaid, addressed to:

Honorable M. Carl Rice
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Shreveport, Louisiana 71101

Honorable Stephen Russell Burke &
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The parties required to be served have been served, this 17th day of April, 1980.

Patrick G. Quinlan
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